IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs November 18, 2008

STATE OF TENNESSEE v. LARRY J. COFFEY, JR.

Appeal from the Circuit Court for Rhea County
No. 16474 Buddy D. Perry, Judge

No. E2008-00087-CCA-R3-CD - Filed February 18, 2009

On August 1, 2005, a Rhea County grand jury charged the defendant, Larry J. Coffey, Jr., with one count of aggravated assault of the victim, Philip Latshaw, *see* T.C.A. § 39-13-102 (2005), and one count of evading arrest, *see* T.C.A. § 39-16-603 (2005). On November 2, 2007, a Rhea County jury convicted the defendant of the lesser-included offense of simple assault, *see* T.C.A. § 39-13-102 (2005), a Class A misdemeanor, and levied a fine of $2,500. After a sentencing hearing, the trial court ordered the defendant to serve 11 months and 29 days in the Rhea County Jail. The defendant appeals only his sentence, arguing that the trial court erred in denying his request for probation and ordering him to serve his entire sentence. Discerning no error, we affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and ROBERT W. WEDEMEYER, JJ., joined.

Howard L. Upchurch, Pikeville, Tennessee, for the appellant, Larry J. Coffey, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; J. Michael Taylor, District Attorney General; and James W. Pope, III, Assistant District Attorney General for the appellee, State of Tennessee.

OPINION

On January 20, 2005, Spring City Police Department officers Jason Yuhas and Don Janow "received a call to go to the area of Piccadilly and Cash Street" at approximately 7:40 a.m. The officers were in uniform and drove a marked police cruiser. Upon arrival at the victim's residence, they observed "[the defendant] . . . standing over [the victim]. [The victim] was face down on the ground, and [the defendant] was striking him with a pool cue." The defendant looked "directly at [the officers]" and ran away from them. Officer Yuhas pursued the defendant while yelling, "Police, stop," numerous times. Officer Yuhas testified that he chased the defendant for approximately 100

yards, then he yelled, "Police, stop or I'll shoot." At that point, the defendant stopped and laid on the ground.

While Officer Yuhas chased the defendant, Officer Janow tended to the victim. He testified that he personally knew the victim; however, he did not immediately recognize him "[b]ecause of the blood." Officer Janow testified that the victim was lying on his back and that he was unresponsive. He said, "There w[ere] no movements except for the rise and fall of his chest when he was breathing." He arranged for the transportation of the victim to the hospital. He testified that the defendant did not have any visible injuries and was not taken to the hospital.

The victim, Philip Latshaw, testified that, in January 2005, he worked at David Clifton Chevrolet in Rockwood and that he volunteered as a firefighter. He was 52 years old and stood five feet and nine and a half inches tall. He testified that he wore a sling on his right arm due to an injury he suffered at work. The victim testified that, on January 20, 2005, he exited the back door of his home and walked to the front of his house where his vehicle was parked on the street. He arrived at his vehicle and "was trying to get the keys in . . . and [he] dropped his keys and when [he] bent over to get [his] keys [he] heard something and then all the frailing [sic] started and beating." He stated that nobody said anything to warn him, and he had "no earthly idea" who the assailant was. He said, "Because my right arm was pretty much so useless and I had my lunchbox in my left arm and stuff, . . . whenever I started up he started beating me with a stick and I went down and came up several times, I guess, fending him off and whatever." The victim stated that the defendant stuck his head "several times" and that he hit him "in the shoulder areas and on [his] arms." He testified that he was knocked to the ground several times and that the assailant told him, "Die you sonofabitch." He said, "[The defendant] choked me until I passed plumb out."

When the victim regained consciousness, he was taken to the hospital. He "had big gashes up in the top of [his] head and then some that they glued up on back and then there [was] a big dent . . . that still hurts a lot if you touch it or rub it or anything." As a result of the assault, the victim's eyes were completely bloodshot. He testified that he missed approximately a month of work. The victim testified that he did not inflict any injuries on the defendant. He identified the defendant as the assailant.

On cross-examination, the victim stated that he was married but had been separated for a "long time" and that he lived at the Piccadilly Avenue residence alone. He stated that he had spoken with the defendant on the telephone prior to January 20, 2005; however, he had not personally met him. He stated that he met the defendant's wife at David Clifton Chevrolet when her and the defendant's vehicle needed servicing.

After the State closed its proof, the defendant took the stand. The defendant testified that he was 40 years old and not married. He stated that he served in the Air Force and worked at Wackenhut Security Services, Inc. in Oak Ridge, where he had security clearance. He said that he married his former wife, Corey Coffey, in December 1998 and that the couple had two children. He testified that he had met the victim two or three times at David Clifton Chevrolet and that they had spoken over the telephone approximately 10 to 15 times. The defendant testified that, while he was married to Corey Coffey, she and the victim were engaged in a sexual relationship. He said that he

learned of the affair on October 12, 2004, and that he went to David Clifton Chevrolet to confront the victim about the affair in November 2004.

On January 20, 2005, the defendant drove to the victim's house and parked across the street in a church parking lot. He did not know where the victim lived; however, he recognized his truck parked on the street because the truck had been at his and his wife's home the previous night. The defendant testified, "I went there to whip him. . . . Because he was still continuing to have an affair with my wife." He arrived at approximately 7:25 a.m., and he wore jeans, a flannel shirt, a toboggan, and gloves because of the cold weather. He brought a pool cue with him.

The defendant testified that he saw the victim and "[a]s soon as he turned at the back side of his vehicle he looked up and that's when [the defendant] walked toward him." The defendant testified that he looked at the victim and said, "Do you know who I am?" According to the defendant, the victim responded "Yes, I know who you are," and the defendant responded, "You're sleeping with my wife." The defendant testified, "[The victim] threw up his hands . . . and started talking and said, 'I am not sleeping with your wife. I hadn't talked to her in two months.'" The defendant stated that, at that point, he was probably three feet from the victim and he "just . . . hit him" in the face with his fist. He explained, "I hit him with everything I had."

He testified that the victim fell down and then "with his left hand [the victim] reached inside his jacket pocket." The defendant said he thought that the victim "was pulling out a handgun," so he reached for the pool cue his right rear pocket. He said, "I pulled it out with my right hand and I struck him on his upper left shoulder with it. Because he told me he had a handgun and he would shoot me if I came to his house." He admitted that the victim never produced any gun. He hit him a second time with the pool cue, then threw it aside. The defendant said that the two "wrestled for quite some time . . . from the rear of his vehicle all the way to the end of the road." He stated, "I was trying my best to get him down. . . . He was fighting really hard. He's very strong." He stated that the two wrestled for a distance of approximately 30 feet until he got the victim down on the ground. At that point, the defendant "just kept hitting him over and over again."

The defendant testified that he remembered seeing "two sets of legs running at [him]," and he could hear someone saying something, although he could not decipher what. He ran "probably a hundred feet or so" until "[f]inally it registered . . . that they were saying, police, stop, or I'll shoot," and he "dropped immediately."

On cross-examination, the defendant testified that, as of January 20, 2005, he was 38 years old, stood six feet and three inches tall, and weighed approximately 185 pounds. He agreed that, during his military training, he received "extensive" training in hand-to-hand combat. When asked if he choked the victim, he said, "I wasn't physically choking him to be choking him, but when I got him down I was holding him down on the upper part of his chest on his neck right here while I was hitting him with my right hand." He said, "I wasn't trying to really inflict a lot of damage. I was just, I was there to whip him."

Based upon the evidence as summarized above, the jury convicted the defendant of the lesser included offense of simple assault and assessed a $2,500 fine. On November 2, 2007, the trial court

held a sentencing hearing. The State called Deputy Kenny Dewayne Cox, bailiff for the Rhea County Courthouse. He testified that, on February 20, 2005, he "was patrolling the north end of the county . . . [and he] came in contact with a white male that was walking northbound." He spoke with the man, later identified as the defendant, to inquire why he was out "so early." Deputy Cox testified, "He advised me that his car had broke down . . . as he was walking and it was dark, that he got turned around and lost basically." Deputy Cox told the defendant that he would give him a ride to his vehicle; however, first he needed to pat him down for safety purposes. During his pat down of the defendant, he found a blue ski mask, a folding knife, a .380 caliber semi-automatic pistol, and a Morgan County Sheriff's Department office card with the name John Wyviski on it.

Deputy Cox arrested the defendant for criminal impersonation and carrying a weapon with intent to go armed. Deputy Cox testified that, while in the back of his police car, the defendant "was speaking about his wife, . . . something about a child and then the statement he made when he was handcuffed in the backseat of the car was, 'I should have killed him.'" Deputy Cox testified that the defendant never mentioned any names. On cross-examination, Deputy Cox noted that the defendant never represented himself as a Morgan County Sheriff's Deputy.

The defendant's presentence report stated that the defendant's possession of a weapon and criminal impersonation charges were pending subject to pretrial diversion. His prior record also showed that he was charged with a violation of an order of protection but that the charge was dismissed. The report also contained the defendant's version of events, which stated as cause for his assault that the victim "also collaborated with [his wife] to abort my unborn child."

The defense called Tom Kilby, who testified that he was the defendant's uncle and that he had raised the defendant since the defendant's father died when the defendant was five years old. The defendant lived with Mr. Kilby until he completed high school and joined the Air Force. He testified that the defendant served in Desert Storm in the 1990s. He testified that the defendant worked at his construction company and also worked as a security officer at Wackenhut until he lost the job due to the criminal charges against him. He said the defendant "works good" and that he has never had a problem dealing with customers and clients.

Mr. Kilby testified that the defendant had joint custody of his two children with Ms. Coffey in which "they rotate from week to week." He stated that the defendant did not drink or use drugs. He stated that Ms. Coffey called the defendant that morning "to wish him good luck." He said, "[The defendant] has conducted hisself [sic] well as far as I've seen and I've seen him everyday almost since that happened." Mr. Kilby explained that, at the time of the assault, the defendant was "[v]ery much" upset about the dissolution of his marriage and that the defendant blamed the divorce on the victim.

On cross-examination, Mr. Kilby stated that the defendant's ex-wife had an order of protection against the defendant, and she filed a violation of the order. He agreed that Ms. Coffey made allegations about the defendant's threatening and abusing her. Mr. Kilby also noted that the defendant had a wife before Ms. Coffey with whom he had children and that the defendant had been jailed for failing to pay his child support. He also agreed that the defendant was once institutionalized for attempting suicide.

At the close of proof, the trial judge stated,

> Guys, I look at this case and we have got a case where the jury gave this man a tremendous break. He went to another man's home, he went to the home of a man that had had surgery, couldn't use one of his arms and to put it rather bluntly, beat the hell out of him. We can have a choice in this country, do we want folks doing that or not. And then on top of that, while on bond for that offense, he is caught in this county with all the equipment necessary to kill somebody.
>
> I don't see how I can do anything but impose eleven months and twenty-nine day sentence to be served and that's the judgment of this court.

The court entered a written judgment on November 2, 2007, and the defendant filed a timely motion for new trial on November 7. The trial court denied the motion for new trial on December 17, 2007, and the defendant filed a timely notice of appeal on December 26, 2007.

As his sole ground for appeal, the defendant argues that "the trial court erred in denying the defendant probation and requiring the defendant to serve the entire sentence." The State argues that the trial court "properly imposed a sentence of confinement."

When there is a challenge to the manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2006). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id.* If appellate review, however, reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In misdemeanor sentencing, the sentencing court is afforded considerable latitude. *See, e.g.*, *State v. Johnson*, 15 S.W.3d 515, 518 (Tenn. Crim. App. 1999), *perm. app. denied* (Tenn. 2000). A separate sentencing hearing is not mandatory in misdemeanor cases, but the court is required to provide the defendant with a reasonable opportunity to be heard as to the length and manner of the sentence. *See* T.C.A. § 40-35-302(a) (2006). Misdemeanor sentences must be specific and be congruent with the principles, purpose, and goals of the Criminal Sentencing Reform Act of 1989. *Id.* §§ 40-35-104, -302 (2006); *State v. Palmer*, 902 S.W.2d 391, 393 (Tenn. 1995). A convicted misdemeanant has no presumption of entitlement to a minimum sentence. *State v. Baker*, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997); *State v. Creasy*, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). The misdemeanor sentencing statute requires that the trial court consider the enhancement and mitigating factors when calculating the percentage of the sentence to be served "in actual confinement" prior to "consideration for work release, furlough, trusty status and related

rehabilitative programs." T.C.A. § 40-35-302(d) (2006); *State v. Troutman*, 979 S.W.2d 271, 274 (Tenn. 1998).

In his brief, the defendant jointly addresses whether he should have received probation or some other alternative sentence. However, the determination of entitlement to full probation necessarily requires a separate inquiry from that of determining whether a defendant is entitled to a less beneficent alternative sentence. *See State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000). A defendant is required to establish his "suitability for full probation as distinguished from his favorable candidacy for alternative sentencing in general." *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see* T.C.A. § 40-35-303(b) (2006); *Bingham*, 910 S.W.2d at 455-56. A defendant seeking full probation bears the burden of showing that probation will "subserve the ends of justice and the best interest of both the public and the defendant." *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), *overruled on other grounds by Hooper*, 29 S.W.3d at 9.

We note that the defendant was statutorily eligible to receive a suspended sentence. *See* T.C.A. § 40-35-303(a). The trial court based the denial of probation on the nature and circumstances of the offense, noting that the jury was lenient in its verdict of simple assault considering that the defendant "beat the hell" out of the victim. The trial court also looked at the facts adduced at the sentencing hearing and noted that "while on bond for that offense, [the defendant was] caught in this county with all the equipment necessary to kill somebody." The trial court was justified in determining that probation would not serve the best ends of justice.

The defendant also claims that the trial court erred in denying some other form of alternative sentencing, and he complains that the trial court did not properly consider mitigating factors in determining whether to deny alternative sentencing. Confinement may be ordered, however, when necessary to avoid depreciating the seriousness of the offense. T.C.A. § 40-35-103(1)(B).

In that view, the nature and characteristics, or circumstances, of the offense have long been recognized as grounds for denying any probation. *Stiller v. State*, 516 S.W.2d 617, 621 (Tenn. 1974); *Powers v. State*, 577 S.W.2d 684, 685-86 (Tenn. Crim. App. 1978); *Mattino v. State*, 539 S.W.2d 824, 828 (Tenn. Crim. App. 1976). The nature and circumstances of the offense may serve as the sole basis for denying alternative sentencing when they are "especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree; and it would have to be clear that, therefore, the nature of the offense, as committed, outweighed all other factors . . . which might be favorable to a grant of [alternative sentencing]." *State v. Travis*, 622 S.W.2d 529, 534 (Tenn. 1981); *see also State v. Cleavor*, 691 S.W.2d 541, 543 (Tenn. 1985), *overruled on other grounds by Hooper*, 29 S.W.3d at 9. Significantly, "[t]his standard has essentially been codified in the first part of T[ennessee] C[ode] A[nnotated] [s]ection 40-35-103(1)(B) which provides for confinement if it 'is necessary to avoid depreciating the seriousness of the offense.'" *State v. Hartley*, 818 S.W.2d 370, 375 (Tenn. Crim. App.), *perm. app. denied* (Tenn. 1991).

The jury convicted the defendant of assault, which the Tennessee Code Annotated defines as "intentionally . . . caus[ing] bodily injury to another." T.C.A. § 39-13-101(a)(1). The defendant, by his own admission, "whipped" the victim. He testified that he struck the victim "with everything

[he] had" and then "just kept hitting him over and over again." He further admitted to using a pool cue to strike the victim at least twice. Clearly, this is a severe case of assault and the trial court acted within its discretion by denying alternative sentencing and ordering the maximum incarceration available for the misdemeanor. *See State v. Samuel D. Braden*, No. 01C01-9610-CC-00457, slip op. at 15 (Tenn. Crim. App., Nashville, Feb. 18, 1998); *State v. Steven A. Bush*, No. 01C01-9605-CC-00220, slip op. at 9 (Tenn. Crim. App., Nashville, June 26, 1997); *State v. Fredrick Dona Black*, No. 03C01-9404-CR-00139, slip op. at 3-4 (Tenn. Crim. App., Knoxville, Apr. 6, 1995) (noting that the trial court may consider a defendant's enjoyment of leniency in selection of a particular conviction offense in awarding or rejecting alternative sentencing).

CONCLUSION

For the aforementioned reasons, we discern no error in the trial court's sentence and affirm the judgment of conviction.

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THOMAS T. WOODALL, JUDGE